

1 EDWINA E. DOWELL, #149059
2 Assistant U.S. Trustee
3 JOHN S. WESOLOWSKI, #127007
4 EMILY S. KELLER, #264983
5 Office for United States Trustees
6 United States Department of Justice
7 280 S. First Street, Suite 268
8 San Jose, CA 95113-0002
9 Telephone: (408) 535-5525
10 Fax: (408) 535-5532
11 Attorneys for August B. Landis
12 Acting United States Trustee for Region 17

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re:
AUTO CARE MALL OF FREMONT, INC.,
a California corporation,
Debtor.

Case No. 12-56050 SLJ
Chapter 11
Date: August 30, 2012
Time: 1:00 p.m.
Place: Courtroom 3099

**OBJECTION OF ACTING UNITED STATES TRUSTEE TO SECURED CREDITOR
BANK OF MARIN'S MOTION FOR ORDER (1) EXCUSING RECEIVER FROM
COMPLIANCE WITH 11 U.S.C. §§ 543(a) AND 543 (b)(1), (2) GRANTING RECEIVER
AUTHORITY TO OBTAIN CREDIT, USE CASH COLLATERAL, AND INCUR DEBT,
AND (3) GRANTING RELIEF FROM THE AUTOMATIC STAY [§362]**

To the Honorable STEPHEN L. JOHNSON, United States Bankruptcy Judge:

Acting United States Trustee August B. Landis objects to creditor Bank of Marin's motion seeking to excuse a state court receiver from compliance with her duties as a custodian to turn over and account for estate assets, and requesting authority for the state court receiver to exercise case administration powers vested exclusively in trustees appointed under applicable provisions of the Bankruptcy Code.¹ The motion impermissibly seeks to allow the state court

¹11 U.S.C. §§ 101 - 1532, as amended. Unless otherwise noted, the word “section” refers to the corresponding section of the Bankruptcy Code.

1 receiver to continue to act as a receiver for an indefinite period of time during the administration
2 of this bankruptcy case. The motion also seeks to improperly cloak the state court receiver with
3 power to obtain credit, use cash collateral, and incur debt. Those powers are expressly conferred
4 upon, and are vested exclusively in, trustees appointed under controlling provisions of the
5 Bankruptcy Code. After appropriate consideration of the best interests of all creditors of this
6 estate, the Court should either (a) dismiss this bankruptcy case; (b) suspend all proceedings in
7 this bankruptcy case until the receivership case has reached its conclusion, at which point the
8 Court will be able to readily determine whether further bankruptcy proceedings are warranted; or
9 (c) require the Receiver to account for and turn over all property of the estate to the trustee (or to
10 the debtor-in-possession, if no trustee has been appointed). This objection is based on the
11 pleadings and papers filed in this case, and the following Memorandum of Points and
12 Authorities.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 1. Debtor Auto Care Mall of Fremont, Inc. filed a voluntary petition under Chapter 11 of
15 the Bankruptcy Code on August 15, 2012.

16 2. The United States Trustee incorporates all pleadings filed in this case into this motion
17 and requests that the Court take judicial notice of those pleadings.

18 3. The primary asset of the bankruptcy estate is a single improved parcel of real property
19 commonly known as 40851 - 40967 Albrae Street, Fremont, CA 94538 (the “Property”).

20 Schedules A and B, Docket # 1, pp. 8 - 11.

21 4. Bank of Marin (“Creditor”) entered into two business loan agreements with the
22 Debtor, one for \$6,000,000 and the other for \$250,000. Those loans are secured, respectively,
23 by the first and second deeds of trust on the Property. Exhibits 1, 2, 3, 4 and 5 to Kindred Decl.,
24 Docket #11.

25 5. Debtor defaulted on the loans by, among other things, continuing to collect rents but
26 becoming delinquent with the monthly payments to the Creditor, and failing to pay county-
27 assessed property taxes. Uecker Decl., Docket # 13; Chiang Decl., Docket # 15.

28 6. On May 18, 2012, the Superior Court granted Creditor’s application for an order

1 appointing Susan L. Uecker to serve as a receiver,² noting that “ . . .(1) the Debtor failed to pay
2 the sums due and owing to Bank of Marin and real property taxes, but continued to collect the
3 rents, issues and profits generated by the Property, and (2) in order to keep the Property
4 operating, it was critical to have the Receiver in place to pay appropriate expenses, to handle
5 repair problems, to retain existing tenants, and to attract new tenants to fill vacancies.” Creditor’s
6 Motion, p. 7, l. 24 - p. 8, l. 2.

7 7. According to the Superior Court Order, there was no opposition to Creditor’s motion
8 for the appointment of a receiver. Exhibit A, p.2, l.5 to Uecker Decl.

9 8. The Receiver’s activities since the Superior Court granted Creditor’s motion and
10 entered an appointment order are detailed in her declaration, which was filed with this court in
11 support of Creditor’s motion (*e.g.*, determining the Debtor’s actual financial situation, payment
12 of utility bills, and preparing vacant units for lease). Uecker Decl., ¶¶ 3, 4, 8, 9, 10.

13 9. Because she was appointed by a state court to serve as a receiver prior to the
14 commencement of this bankruptcy case, the Receiver is a “custodian” as that term is defined by
15 the Bankruptcy Code. *See* 11 U.S.C. §101(11)(A). Having filed a declaration with the Court in
16 support of Creditor’s motion, there is no question that the Receiver has actual knowledge of this
17 bankruptcy case.

18 10. Controlling provisions of the Bankruptcy Code require a custodian, upon learning of
19 the commencement of a bankruptcy proceeding, to turn over property of the estate to the debtor-
20 in-possession (or to the trustee if one has been appointed), and to provide an accounting for “any
21 property of the debtor, or proceeds, product, offspring, rents, or profits of such property that, at
22 any time, came into the possession, custody, or control of such custodian.” *See* 11 U.S.C.
23 § 543(b)(1). Turnover has not occurred, and no accounting has yet been provided by the Receiver
24 in this case.

25 11. The Bankruptcy Code does provide bankruptcy courts with the discretion to excuse
26 custodians from compliance with their turnover and accounting obligations if doing so would
27

28 2²Ms. Uecker is referred to as the “Receiver” in the balance of this Objection.

1 serve the interests of all creditors.³ *See* 11 U.S.C. § 543(d)(1). The duration of excused
2 compliance should not be indefinite, though, and should be limited to the period of time
3 necessary to enable the bankruptcy court to determine whether to dismiss or suspend the
4 bankruptcy case in light of the pending receivership case:

5 Once the bankruptcy case commenced, however, the receiver's
6 status as a receiver raises a serious question. Under 11 U.S.C.
7 §105(b), a bankruptcy court may not appoint a receiver. Under
8 11 U.S.C. §543(d), the bankruptcy court may temporarily
9 permit a receiver to remain in place while the court decides
10 whether to abstain to the receivership proceeding, or instead
11 require the receiver to turn over the property of the estate to the
12 trustee (or to the debtor-in-possession, if no trustee has been
13 appointed). *See In re Plantation Inn Partners*, 142 B.R. 561
14 (Bankr. S.D. Ga. 1992). Allowing Wedren to continue
15 indefinitely as receiver thus appears to be inconsistent with
16 the Bankruptcy Code. *See Plantation Inn Partners*, 142 B.R.
17 at 564. Had Wedren been put in place by this court to replace
18 prior management, he would have been appointed trustee, not
19 receiver, because §105(b) bars the appointment of a receiver
20 to run the debtor.

21 In re Stratesec, Inc., 324 B.R. 156, 157 (Bankr. D. Colo. 2004).

22 12. To the extent that Creditor's motion seeks to indefinitely excuse the Receiver from
23 compliance with her turnover and accounting obligations as a custodian under 11 U.S.C.
24 § 543(b), it runs afoul of the Bankruptcy Code's specific prohibition against the appointment of a
25 receiver to operate the debtor during a bankruptcy case, and should be denied. *See Stratasec*, 324
26 B.R. at 157; 11 U.S.C. § 105(b).⁴ If the Court determines after notice and a hearing that the
27 Receiver should be excused from compliance with her turnover and accounting obligations as a
28 custodian under 11 U.S.C. § 543(b), compliance should be excused only for so long as is
necessary to allow the Court to decide whether it is in the best interest of creditors to (a) dismiss

24 ³The Creditor claims that all creditors will benefit from its motion to keep the Receiver in place. The
25 Receiver is not an equity receiver, though, having been appointed pursuant to the Creditor's motion, and
26 solely as a remedy for default under the Creditor's loan documents. *See* Creditor's Motion, Docket #11,
p.2, l.9; p.4, l.3; p.5, l.2; p.8, l.21.

27 ⁴If the Receiver were indefinitely excused from turnover, there would be virtually nothing in the
28 bankruptcy estate to be administered for the benefit of creditors, and cause would exist to dismiss or
convert the case. 11 U.S.C. § 1112(b)(4)(A). In fact, the United States Trustee may be compelled to
seek such relief. 28 U.S.C. § 586(a)(8).

1 this bankruptcy case; (b) suspend all proceedings in this bankruptcy case until the receivership
2 case has reached its conclusion, at which point the Court will be able to readily determine
3 whether further bankruptcy proceedings are warranted; or (c) require the Receiver to turn over
4 the property of the estate to the trustee (or to the debtor-in-possession, if no trustee has been
5 appointed). *See Stratesec, supra; see also* 11 U.S.C. § 305(a)(1).

6 13. To the extent that Creditor's motion seeks to vest the Receiver with certain case
7 administration powers, including the authority to obtain credit, use cash collateral, and incur
8 debt, it violates controlling provisions of the Bankruptcy Code and must be denied for several
9 reasons. First, a custodian with knowledge of the commencement of a bankruptcy proceeding
10 “*may not make any disbursement from, or take any action in the administration of, property of*
11 *the debtor [. . . .] or property of the estate, in the possession, custody or control of such*
12 *custodian*, except such action as is necessary to preserve such property.” *See* 11 U.S.C.
13 § 543(a)(emphasis added). Second, authority to obtain credit, use cash collateral, and incur debt
14 are case administration powers expressly conferred upon and vested exclusively in trustees
15 appointed under controlling provisions of the Bankruptcy Code (or debtors in possession if no
16 trustee has been appointed). Those powers are not conferred upon custodians. *See, e.g.*, 11
17 U.S.C. §§ 363(b)(1)(“**The trustee**, after notice and a hearing, may use, sell, or lease, other than in
18 the ordinary course of business, property of the estate [. . . .]; 363(c)(1)(“[U]nless the court orders
19 otherwise, **the trustee** may enter into transactions, including the sale or lease of property of the
20 estate, in the ordinary course of business, without notice or a hearing, and may use property of
21 the estate in the ordinary course of business without notice or a hearing.”); 363(f)(“**The trustee**
22 may sell property under section (b) or (c) of this section free and clear of any interest in such
23 property of an entity other than the estate” if certain conditions are met); 363(g)(“[T]he trustee
24 may sell property under subsection (b) or (c) of this section free and clear of any vested or
25 contingent right in the nature of dower or courtesy.”); 364(a) (“[U]nless the court orders
26 otherwise, **the trustee** may obtain unsecured credit and incur unsecured debt in the ordinary
27 course of business [. . . .]; 364(b) (The court, after notice and a hearing, may authorize the
28 trustee to obtain unsecured credit or incur unsecured debt other than under subsection (a) of this

1 section [. . . .]); and 364(c)(*If the trustee is unable to obtain* unsecured credit allowable [. . . .]
2 as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of
3 credit or the incurring of debt” if certain conditions are met)(emphasis added); *see generally* 11
4 U.S.C. § 1107 (in chapter 11 bankruptcy cases where no trustee has been appointed, and with
5 certain express exceptions, a debtor in possession generally has the rights and powers of a
6 chapter 11 trustee). Finally, as noted above the Receiver was appointed by a state court prior to
7 bankruptcy. The Receiver has not been appointed to serve as a trustee by this Court after the
8 bankruptcy petition in this case was filed. As a result, the Receiver is nothing more than a
9 “custodian” as that term is defined by the Bankruptcy Code. She is not a trustee. *Compare* 11
10 U.S.C. § 101(11)(A) *with* 11 U.S.C. § 1104(a)(“***At any time after the commencement of the***
11 ***case*** but before confirmation of a plan, on request of a party in interest or the United States
12 trustee, and after notice and a hearing, ***the court shall order the appointment of a trustee***” if
13 certain conditions are satisfied)(emphasis added). Because the Receiver *is* a custodian, she is
14 prohibited from exercising case administration powers by the express terms of 11 U.S.C. 543(a).
15 Because the Receiver *is not* a trustee, there is no statutory basis in the Bankruptcy Code for
16 vesting her with the authority to obtain credit, use cash collateral, or incur debt as requested in
17 Creditor’s motion. Creditor’s motion is therefore fatally flawed, and must be denied.

18 14. Although the relief requested in Creditor’s motion must be denied, the fact remains
19 that there are two separate cases (the receivership proceeding and this bankruptcy case) that are
20 simultaneously pending before two different courts (one state court and one federal court), in
21 which both courts have jurisdiction over issues related to the administration of a single asset: the
22 Property. Section 305(a)(1) of the Bankruptcy Code provides a roadmap for resolution of such
23 situations, which avoids potentially contradictory outcomes in the two simultaneously pending
24 cases and promotes the interests of judicial economy. More particularly, section 305(a)(1)
25 provides for either dismissal of the bankruptcy case, or abstention and suspension of all
26 proceedings in the bankruptcy case “if the interests of creditors and the debtor would be better
27 served by such dismissal or suspension.”

28 15. “Clearly, the historical and contemporary trend in § 305 case law permits courts to

1 consider a wide variety of factors relevant to the facts of the particular case in determining
2 whether to abstain under § 305." In re Spade, 258 B.R. 221, 231 (Bankr. D. Colo. 2001).

3 Dismissal or abstention under section 305 of the Bankruptcy Code is an appropriate remedy
4 under the specific facts of this case for the following reasons:

- 5 • This appears to be a simple two party dispute between the Creditor, who is served
6 by the Receiver, and the debtor. Their dispute is presently the subject of
7 receivership proceedings in state court. It is unclear that there is any prejudice to
8 the parties were their dispute to remain in that forum. Dismissal or suspension is
9 appropriate when, among other things, the case is really a two - party dispute
10 between the debtor and a single creditor. *See In re ELRS Loss Mitigation, LLC*,
11 325 B.R. 604 (Bankr. N.D. Okla. 2005)
- 12 • The availability of another forum to protect the interests of the parties, or whether
13 there is already a pending proceeding in state court, is often considered by courts
14 in determining whether dismissal or abstention and suspension of bankruptcy
15 proceedings pursuant to § 305 is appropriate. In re Spade, 258 B.R. 221, 233
16 (Bankr. D. Colo. 2001). Here, the pending receivership proceeding provided a
17 sufficient forum to address the dispute between the Debtor and Creditor for some
18 time prior to the filing of this bankruptcy case.
- 19 • "The absence of a true bankruptcy purpose (e.g., debt adjustment, breathing spell
20 from creditors, and need for discharge and fresh start) is a significant factor in
21 favor of granting § 305(a)(1) relief." 2 ALAN N. RESNICK & HENRY J. SOMMER,
22 COLLIER ON BANKRUPTCY ¶ 305.02[2][b] (16th ed. 2011). *See also In re Duratech*
23 Indus., Inc., 241 B.R. 291, 299 (Bankr. E.D.N.Y. 1999) (" . . . the Court enters an
24 order formally abstaining from further administration of the chapter 11 case under
25 11 U.S.C. § 305(a) when the chapter 11 case is at bottom a two party dispute
26 between the debtor and another party so that those parties may negotiate a
27 structured dismissal of the case within a short period of time." and "There is no
28 legitimate point to be gained in having this Court engage in a more active

1 administration of this case pending the outcome of litigation before the District
2 Court.”). Debtor was found by the state court to have mismanaged the estate.
3 Debtor did not oppose the appointment of a receiver. The Receiver has invested
4 more than three months in the possession, custody and control of the Property, and
5 no complaints regarding the Receiver’s efforts are evident from the record. If the
6 Court concludes that the Receiver is performing well and properly administering
7 the Property, no true bankruptcy purpose would be advanced by further
8 proceedings in this case.

9

- 10 • Economy and efficiency of administering the bankruptcy case is a consideration in
11 determining whether dismissal or abstention under section 305(a)(1) is
12 appropriate. In re Spade, 258 B.R. 221, 235 (Bankr. D. Colo. 2001). Debtor will
13 incur administrative costs in this chapter 11 case (e.g., attorney fees, quarterly
14 fees, fees for the trustee (if appointed), and possibly property management fees)
15 that are in duplication of and/or in addition to the ongoing costs in the
16 receivership case. Dismissal or abstention under section 305 would conserve the
17 assets of both the receivership estate and the bankruptcy estate by avoiding
18 unnecessary duplication of costs in the administration of a single asset: the
19 Property. The interests of judicial economy would also be served by having a
20 single court oversee the administration of the Property going forward.

21 WHEREFORE, the Acting United States Trustee requests that the Court enter an order:

22 A. Denying the relief requested in Creditor’s motion in its entirety;

23 B. In accordance with 11 U.S.C. § 305(a)(1), either:

24 i. Dismissing this bankruptcy case;

25 ii. Suspending all proceedings in this bankruptcy case until the receivership
26 case has reached its conclusion, at which point the Court will be able to
27 readily determine whether further bankruptcy proceedings are warranted;
28 or

29 iii. Requiring the Receiver to account for and turn over all property of the

estate to the trustee (or to the debtor-in-possession, if no trustee has been appointed); and

C. Granting such other and additional relief as is just and equitable.

Dated: August 28, 2012

Respectfully submitted,

August B. Landis
Acting United States Trustee
Region 17

By: /s/ Edwina E. Dowell
Edwina E. Dowell, Esq.
Attorney for Acting United States Trustee